No. 79-434

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAY NORRIS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion (Pet. App. 1a-19a) of the court of appeals is reported at 598 F.2d 1244. The order of the Federal Trade Commission (Pet. App. 128a-137a) and the Commission's opinion (Pet. App. 103a-128a) are reported at 91 F.T.C. 751, 834, 859.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1979. On July 16, 1979, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment rights of petitioners, who had repeatedly made deceptive advertising claims unsupported by the information available to them, were violated by an order of the Federal Trade Commission prohibiting them from making safety or performance claims "unless petitioners have a reasonable basis for the representation(s) consisting of competent and objective material, available in written form, that fully and completely substantiates such representation(s)."

2. Whether the Commission has authority to impose such a prospective order to prevent future false advertising abuses by a firm which had repeatedly engaged in false advertising over a number of years.

STATEMENT

Petitioner Jay Norris, Inc. is a mail-order company that offers hundreds of gift and novelty items to consumers through catalogs and advertisements appearing in newspapers and other publications such as TV Guide. Petitioners Joel Jacobs and Mortimer Williams are the principal shareholders and officers of Jay Norris, Inc. (referred to collectively as "Jay Norris").

On complaint and after evidentiary hearings, the Commission found that Jay Norris had made product advertising claims that were false and misleading.[1] As summarized by the court of appeals, petitioners made (Pet. App. 4a-5a):

> false and deceptive advertising claims * * * as to efficacy, performance, and safety in connection with

[1]There were a number of other unfair and deceptive practices found by the Commission not directly related to the issues raised here by petitioners, including failure to perform promises of immediate delivery and prompt refunds. See Pet. App. 33a-34a, 38a-55a, 83a-84a, 87a-89a, 104a-108a.

> six widely varying products—(1) a propane "flame gun" that would "dissolve the heaviest snow drifts, whip right through the thickest ice"[4]; (2) roach powder that was "completely safe to use" and "never loses its killing power—even after years"[5]; (3) an "electronic miracle" that makes "your home wiring a huge [TV or FM radio] antenna for super reception"[6]; (4) a "5-year" flashlight that carries an "absolute 5-year guarantee"[7]; (5) a "minted" Lincoln-Kennedy ["]Commemorative" penny accompanied by a free "Plaque of Coincidences"[8]; and (6) "carefully maintained" cars "in regularly maintained fleet use * * * thoroughly serviced."[9] The quotations are selective and are by no means inclusive of the falsity and deception that the advertising blurbs relating to these six products display."[2]

[4]According to expert testing and consumer testimony, it did neither.

[5]It was neither safe nor so deadly.

[6]It does not.

[7]The manufacturer's guarantee was for five years[] *or* ten hours' use [original emphasis].

[8]There is no such official penny; and the item offered for sale has no numismatic or historical significance, is not "commemorative," and was never "minted." The "Plaque" was not free.

[9]The cars, no longer sold, were former New York City taxicabs, and many owners had nothing but trouble with them.

[2]For example, Jay Norris also falsely claimed that its roach powder could start "a deadly chain reaction * * * that wipes out every roach and every egg in" the nest and would prevent reinfestation for up to five years if left in place (Pet. App. 60a-61a, 110a-111a). But this powder, common boric acid long used to kill roaches, would cause no such "chain reaction," would have no effect on roach eggs at all, and would not remain effective for five years under normal conditions (Pet. App. 61a-63a). The flashlight manufacturers' guarantee

The Commission entered a cease and desist order which contains specific prohibitions against misrepresentations of the types found to have existed in the past, *e.g.*, a prohibition against "[m]isrepresenting, directly or indirectly, the time or manner in which [petitioners'] flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice" (Pet. App. 134a). In addition, Paragraph 1.6 of the Commission's order, as rephrased by the court of appeals (Pet. App. 18a-19a),[3] forbids Jay Norris from:

> Representing the safety or performance characteristic(s) of any product unless respondents have a reasonable basis for the representation(s) consisting of competent and objective material, available in written form, that fully and completely substantiates such representation(s).[4]

As the court of appeals noted (Pet. App. 5a), the Commission gave careful consideration to Jay Norris' objections to the provision, and specifically did not prohibit Jay Norris, a mail order retailer selling products

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expressly warned that the light would "remain usable for a period of five years providing it has not been used more than 10 hours" (Pet. App. 66a). And the antenna was inferior to all of the "conventional home and 'rabbit-ears' antennas" with which it was compared (Pet. App. 71a n. 9, 115a). With respect to the false and misleading advertising claims generally, see Pet. App. 58a-80a, 108a-117a.

[3]The provision, before it was modified by the court of appeals "in the interest of clarity" (Pet. App. 18a), read:

> Representing the safety or performance of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form [Pet. App. 134a].

[4]This requirement is essentially a more explicit statement of the requirements imposed by Congress in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 12a, 123a).

manufactured by others, from making any false, deceptive or misleading representations about these products. Rather than hold it strictly liable for the absolute truth of claims for products manufactured by someone else—claims they might reasonably base on the manufacturers' own claims—the Commission said it

> impose[d] a lesser remedy by requiring that respondents not make a safety or performance claim for any product without a reasonable basis. * * * [R]espondents must simply substantiate these claims, and this will absolve them of civil penalty liability should any claim ultimately be proven false * * *" [Pet. App. 123a n.30].

Aside from relying on the manufacturers' claims, Jay Norris could also comply by obtaining "technical advice of qualified persons * * * [in] writing" (Pet. App. 126a).

The Commission limited its order to representations of performance and safety.[5] But in light of Jay Norris' recidivist history of false advertising[6] and the fact that the violations involved "a wide variety of products and a wide variety of deceptive claims" (Pet. App. 125a), the Commission concluded that an order not covering all of its products "would do very little to protect the public."[7]

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[5]The provision recommended by the administrative law judge, broader than that issued by the Commission, required prior substantiation for representations of "any other characteristic" of a product (*e.g.*, value, sales prices, content, size, etc.) in addition to performance and safety representations (Pet. App. 99a).

[6]In addition to this proceeding petitioners were the subject of two Commission orders, in 1965 and 1968, and orders of the U.S. Postal Service in 1974 and the State of New York Bureau of Consumer Frauds and Protection in 1976 (Pet. App. 69a, 125a n.33).

[7]The Commission noted that since many products were involved and petitioners did not specialize in any one category of products, a narrower order would merely "shift [future deception] to a different part of respondents' catalog" because of petitioners' "penchant for misrepresentation" (Pet. App. 125a & n.35).

The court of appeals in affirming the Commission's order rejected Jay Norris' argument that Paragraph I.6 shifts to it the burden of proof in a subsequent proceeding to enforce a cease and desist order (Pet. App. 6a-11a). The Court further found that the Commission's order was within its authority and is "reasonably calculated to prevent violations of the sort found to have been committed" (Pet. App. 12a). It agreed with the Commission's reasoning that, as "Jay Norris is in a better position than consumers to evaluate safety and performance claims for products sold by it" and has a "proven predilection * * * to misstate these characteristics, the company [may] henceforth be required to have a reasonable basis for such claims" (Pet. App. 12a).

Finally, the court rejected petitioners' argument that the order deprives them of their First Amendment rights (Pet. App. 16a-18a).

ARGUMENT

This case does not raise any issues that warrant review by this Court. The courts have consistently upheld the Commission's authority to impose prior substantiation requirements in false advertisement cases like this one; the facts of this case provide ample justification for imposing the requirement against petitioners. Moreover, there is no conflict among the circuits over whether an order issued in these circumstances violates the First Amendment rights of petitioners.[8]

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[8]In urging the Court to review this case, petitioners state that the Commission has announced an intention to require all advertisers to abide by the provisions of Paragraph I.6, once the provision goes into effect (Pet. 3). In support of this assertion they refer to a passage in the Commission's opinion where, in rejecting an argument that prior substantiation requirements should be addressed solely in a rulemaking proceeding, the Commission stated "[m]oreover, under

1. Paragraph I.6 of the Commission's order does not, contrary to Jay Norris' contention, prohibit, "truthful advertising" (Pet. 13) or shift the burden of proof of veracity to Jay Norris (Pet. 18-19). The provision merely requires Jay Norris to have "reasonable basis" (consisting of "competent and objective material, available in written

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15 U.S.C. 45(m)[(1)(B)], the Commission is free to hold other concerns to the same standards we are imposing on these respondents, when the order we will enter becomes final" (Pet. App. 126a). Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), enacted in 1975, provides for civil penalty actions under certain circumstances against any person who engages in an act or practice which has been declared by the Commission to be unfair or deceptive in a previous adjudication leading to an order, "whether or not such person * * * was subject to such cease and desist order."

The Commission has authorized us to state that, contrary to what the quoted statement in its opinion may have implied, it has no intention of using Paragraph I.6 of the order as the predicate for a civil penalty suit against other advertisers. With respect to its authority under Section 5(m)(1)(B), the Commission takes the view that the unfair or deceptive acts or practices that can form the basis of a civil penalty action under that provision are those that are specifically adjudicated to be such in an administrative proceeding, not practices covered by an order such as Paragraph I.6 that goes beyond the specific practices that were adjudicated.

Nor is there any basis for petitioners' repeated assertions that the Commission has considered this a "test case" to expand its authority (Pet. 4, 9, 15). On the contrary, the Commission noted in its opinion that there was nothing novel about the substantiation requirement contained in its order—that similar requirements have been imposed many times and approved by the courts of appeals (Pet. 121a-122a). See, *e.g.*, *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir. 1976); *Firestone Tire & Rubber Co.* v. *FTC*, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); see also *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333 (2d Cir.) cert. denied, 419 U.S. 993 (1974); all cited and discussed by the court of appeals (Pet. App. 11a-12a).

form") to support an assertion of product safety or performance at the time it makes such an assertion in advertising. If it has competent documentation, either from its own examination or evidence obtained from a manufacturer, it would not be subject to liability under the order for making the claim even if the claim proved to be untrue. In any civil penalty proceeding brought for violation of Paragraph I.6, the government would have the burden of proving that Jay Norris made a safety or performance claim and that it lacked a reasonable basis when it did so. (If the Commission, however, believed that any advertising claim was deceptive because untrue, the Commission would have the burden of proving the untruth).

There is no substance to the contention that the Commission lacks authority to impose such a "fencing-in" requirement. In *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), the Court stated:

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470, 473: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419, 431.

The Commission is authorized to restrain similar or related acts, especially where violations have been extensive and substantial in number (*FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957)), and its authority to fashion appropriate remedies has been likened to that of a

district court in issuing injunctive decrees. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311-312 & n.17 (1963). Here, the Commission carefully considered the scope of the order, reasonably ascertained that a narrower order would fail to protect the public (Pet. App. 124a-126a), and crafted an order that does no more than require a repeated and proven false advertiser to exercise a minimal degree of care in its advertising in the future.

Similar Commission orders requiring prior substantiation of advertising claims have been upheld by other courts of appeals as remedies in false advertising cases, *Porter & Dietsch, Inc.* v. *FTC*, 1979-2 Trade Cases (CCH), para. 62,796 at 78,625-78,626 (7th Cir. August 8, 1979), petition for cert. pending, No. 79-731; *Firestone Tire & Rubber Co.* v. *FTC*, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); *Tashof* v. *FTC*, 437 F.2d 707, 715 (D.C. Cir. 1970). Furthermore, as the court below noted, the obligation imposed by the order provision is no greater than is required of all advertisers under the Federal Trade Commission Act: "It is merely more explicit" (Pet. App. 12a).

This Court has emphasized the limited scope of judicial review of Commission orders:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. * * * [J]udicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * [T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. *FTC*, 327 U.S. 608, 611-613 (1946). See, also, *FTC* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394-395; *FTC* v. *National Lead Co.*, *supra*, 352 U.S. at 428-430 & 430 n.7; *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952). The court of appeals carefully reviewed the Commission's order and determined that it satisfied these tests (Pet. App. 11a-12a, 15a-16a). There is no need for further review.

2. Petitioners argue (Pet. 9-15) that there is a conflict among the circuits with respect to the test to be applied under the First Amendment in the regulation of commercial advertising because the court below failed to state in so many words that the Commission's order is no more restrictive than necessary to eliminate future deceptive advertising. But the Commission's order, in light of its careful and complete factual findings, was cautiously tailored to meet the practical business situation of Jay Norris and thus meets the standards articulated by any other courts of appeals cited by petitioners. More important, it clearly satisfies the test laid down by this Court most recently in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

In *Professional Engineers*, an antitrust decree prohibited the Society from adopting any official statement representing or implying that competitive bidding is unethical. One of the issues before the Court was whether the decree violated the Society's First Amendment right of free expression.[9] The Court upheld

[9]The court of appeals had deleted a portion of the decree which ordered the Society to state that it did not consider competitive bidding to be "unethical," reasoning that "[t]o force an association of individuals to express as its own opinion judicially dictated ideas is to encoach on that sphere of thought and expression protected by the First Amendment. Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest." *United States* v. *National Society of Professional Engineers*, 555 F.2d 978, 984 (D. D.C. 1977). Contrary to Jay Norris' assertion (Pet. 11 n.17), this Court did not review the court of appeals' modification or the standard which it employed as the Government did not seek review of that decision. See 435 U.S. at 686 n.8. Moreover, the court of appeals was addressing a question of remedy not involved here, namely, whether an association of individuals can be required by a court to express as its own belief what is in essence a value judgment.

the decree and in doing so stated that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct" (435 U.S. at 698); that "[in] fashioning a remedy, the District Court may, of course, consider the fact that its injunction may inpinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations" (*id.* at 697-698).

Professional Engineers reaffirmed the principle established in other cases that the First Amendment does not immunize proven violators from remedies designed to undo their past violations and to prevent future ones. As the Court stated in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976): "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." And in preventing potentially false and deceptive commercial speech, the government may if necessary prohibit some speech that is not, by itself, necessarily false or deceptive. Thus, in *Friedman* v. *Rogers*, 440 U.S. 1, 13 (1979), the Court upheld a state ban on the practice of optometry under a trade name because of "[t]he possibilities for deception * * *." In that case the state broadly banned all optometrists from using trade names.

Here, in contrast, the Commission's order applies only to an established violator and requires it to do no more than any reasonably careful businessmen would do in assuring that its advertisements were not false or misleading.

In any event, the Commission's order here meets the "least restrictive remedy" test urged by petitioners. The Commission considered petitioners' argument that the order should be limited to simple proscriptions against false advertisements of the precise type found and determined that such a limited order would be totally inadequate to protect the public in view of the numerous products and changing inventory offered by Jay Norris and its proclivity to misrepresent (Pet. App. 125a). The Commission found it necessary to require Jay Norris to substantiate all future performance and safety claims and to have such substantiation available in written form because to do otherwise would, based on petitioners' past conduct, place the Commission on an endless enforcement treadmill. Any actual "chilling" effect on truthful advertising should be minimal. Jay Norris sells products made by someone else. It may rely on the manufacturers' warranties or claims, or the written advice of a qualified technical expert. If petitioners are unable to obtain such minimal substantiation from the manufacturers, their advertising claims are likely to be untrue and thus not worthy of protection for transmittal to consumers. The prohibition of unsubstantiated claims by a retailer with a history of making egregiously false claims belied by the information available to it at the time does no violence to the First Amendment.

No other court of appeals decision is to the contrary. In *Standard Oil Co. of California* v. *FTC*, 577 F.2d 653 (9th Cir. 1978), the court in narrowing the coverage of the Commission's order to a particular product, generally

approved orders covering all of a firm's products, where, as in this case, the past false advertising showed "blatant and utter disregard of the law" and the seller "had a history of engaging in unfair trade practices" (577 F.2d at 662-663). In that case, only a single product of a manufacturer of thousands of items was improperly advertised and that company "never before been accused of false advertising" (*id.* at 663). By contrast, Jay Norris was found to have engaged in false advertising of a number of products. Two other cases on which petitioners rely provide them no support; one involved the requirement of affirmative corrective advertising to undo the deception in prior false advertisements. Such corrective advertising was approved in *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). The other case involved a Commission order requiring an advertiser to make certain affirmative disclosures when it made certain representations that would be otherwise misleading; the court modified the order slightly. *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 164 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). The Commission's order in this case, however, imposes no such affirmative disclosure requirement and those cases are therefore inapposite.[10]

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[10]In *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), the Third Circuit required the Commission to use a more exact and refined prohibition than its proscription of the phrase "Instant Tax Refunds," where the Commission found that it had been used deceptively in the past as a label for a small loan company's standard loans. Although we believe the Third Circuit erred in concluding that the remedy imposed by the Commission in that case was not adequately tailored to the violations proved, the facts of this case are quite different, and, as we have shown, amply support the Commission's remedy.

3. Jay Norris' argument (Pet. 20-22) that the order is impermissibly vague is insubstantial. Petitioner's argument appears to be based primarily on the complaint that the Commission and the court of appeals failed to declare whether certain types of representations would come within the terms of the order (see Pet. 6 and Pet. App. 138a-139a). Such declaratory advice is not the function of a cease and desist order; it is sufficient if the terms are clear enough "to avoid raising serious questions as to their meaning and application" (*FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 367-368 (1962)) and "are as specific as the circumstances will permit" (*FTC* v. *Colgate Palmolive Co.*, *supra*, 380 U.S. at 393). Moreover, as the Court stated in *Colgate-Palmolive, supra*, 380 U.S. at 394, if Jay Norris is "sincerely unable to determine whether a proposed course of action would violate the present order, [it] can, by complying with the Commission's rules, oblige the Commission to give [it] definitive advice as to whether [its] proposed action, if pursued, would constitute compliance with the order" (footnote omitted). See 16 C.F.R. 3.61(d). See also *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 698-699.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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